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IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 56 OF 2018

(Civil Jurisdiction)

IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT
RULES AND ORDER 88 RULE 1 OF THE
RULES OF THE SUPREME COURT OF
ENGLAND 1999 EDITION

IN THE MATTER OF: THE MORTGAGE OVER SUBDIVISION NO.
1023 OF FARM 378a AVONDALE, LUSAKA

BETWEEN:

GIFT MULAMBO MOONGA



APPELLANT

AND

STANDARD CHARTERED BANK ZAMBIA
PLC

RESPONDENT

CORAM: Chashi, Lengalenga and Siavwapa, JJA

ON: 9th August and 3rd October 2018

For the Appellant: L. Mwanabo, Messrs, L. M. Chambers

For the respondent: R. Mwala, Messrs A. M. Wood and Company

R U L I N G

CHASHI, JA delivered the Ruling of the Court.

Cases referred to:

1. ***Sanat Limited v Shaileshkumar Suryakant – SCZ Appeal No. 146 of 2017***

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2. ***Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited – SCZ Judgment No. 20 of 2011***
3. ***Philip Mutantika and Another v Kenneth Chipungu – SCZ Judgment No. 13 of 2014***
4. ***Shoprite Checkers Limited and Another v Lewis Chisanga Mosho and Another – SCZ Judgment No. 40 of 2014***
5. ***Ruth Kumbi v Robinson Kaleb Zulu (2009) ZR, 183***

Legislation referred to:

1. ***The Supreme Court Practice (White Book) 1999***
2. ***The Court of Appeal Rules, 2016***

Before we could hear the appeal in the main, the Respondent on 4th July 2018, filed a Notice of intention to raise a preliminary point of law pursuant to Order 14A and Order 33/3 of ***The Rules of the Supreme Court¹ (RSC)*** for determination of the following questions of law:

- (1) Whether or not the appeal stands dismissed in light of the ruling dated 5th June 2018 and the appellant's failure to comply with the same.
- (2) Whether or not the appeal herein can be determined by this Honourable Court in light of the missing pieces of material evidence in the record of appeal.

According to the Respondent, a single Judge of this Court on 5th June 2018 granted the Appellant leave to file an amended record of appeal and heads of argument on or before 8th June 2018. The learned Judge went on to further order that:

“It is further Ordered that unless the Appellant strictly complies with the Order, the appeal shall stand dismissed without further hearing.”

It is in the affidavit in support of the Notice asserted that, the Appellant failed to comply with the ruling of the Court, which prompted the Respondent on 8th June 2018 to file an application for an Order to dismiss the appeal.

The Appellant then, unknown to the Respondent, filed an ex-parte application to vary the ruling, which application the Court granted and ordered extension of time to each party by seven days to comply with the ruling.

It is the Respondent's assertion that, despite the extension of time, the Appellant yet again failed to comply.

According to the Respondent, as can be seen at pages 54 and 85 of the amended record of appeal, the statement of accounts on the said pages are incomplete. The said statement of accounts misses a material page which contains the appellant's payment and the Appellant's default in servicing the mortgage.

The Respondent then went on to produce copies of the complete statement of accounts.

In the accompanying written arguments, the Respondent submitted that the Appellant is in breach of the Court's ruling and the appeal should be dismissed as the Court is proscribed from hearing appeals where material evidence is not before the Court.

In response, the Appellant filed an affidavit in opposition in which he deposed that he did partially comply with the ruling by filing and serving the Respondent with the amended record of appeal and heads of argument within the stipulated time.

According to the Appellant, the issue of the missing document was not brought to his attention at the time of the amendment. The Appellant asserted that the documents were not wantonly left out to mislead the court or hide evidence but were inadvertently skipped when scanning copies which were sent to his Advocates. That he had subsequently made an application to file a supplementary record of appeal containing the missing pages. That moreover, the Respondent has also exhibited the full documents in issue making the document available to the Court. furthermore, the parties have already filed their respective arguments in the appeal.

According to the Appellant, it would not be in the best interest of justice to dismiss the appeal.

At the hearing of the preliminary issue, Mr. Mwala, Counsel for the Respondent relied on the Notice and affidavit in support of the notice, Respondents arguments, affidavit in reply and argument in support of the affidavit in reply. Our attention was drawn to the case of **Sanat Limited v Shaileshkumar Suryakant**¹ where it was observed that dismissal finally terminates the dismissed action and no further steps can be taken in relation to the claims made in it. The Court becomes *functus officio*. Reliance was also placed on the case of **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited**² where it was held that:

“It is important to adhere to the Rules of the Court in order to ensure that matters are heard in orderly and expeditious manner... those who choose to ignore rules of court do so at their own peril.”

Further reference was made to the case of **Philip Mutantika and Another v Kenneth Chipungu**³ where the Supreme Court had this to say:

“On our part, we have always understood the need for parties to strictly adhere to the rules of Court and that failure to comply can be fatal to a party’s case.”

Mr. Mwanabo, Counsel for the appellant relied on the affidavit in opposition and the accompanying arguments and in particular the case of **Shoprite Checkers Limited v Lewis Chisanga Mosho**⁴ where an application objecting to the hearing of an appeal was raised, but the Supreme Court dismissed the objection as the document which was missing had been supplied in the affidavit in opposition and that in casu the document in issue had been supplied in the Respondent’s affidavit in support of the Notice. That therefore, this Court has all the relevant documents to determine the appeal on its merit.

We have considered the affidavit evidence, authorities cited and the arguments in respect to the preliminary issue before us.

We note that when it became apparent that the Respondent would not be able to comply with the ruling of 5th June 2018 in which an “Unless” Order was given, they applied to the Court for extension of time which application as earlier alluded to was granted.

We see nothing wrong in the procedure that was adopted. In the case of **Ruth Kumbi v Robinson Kaleb Zulu**⁵, the Supreme Court held *inter alia* that:

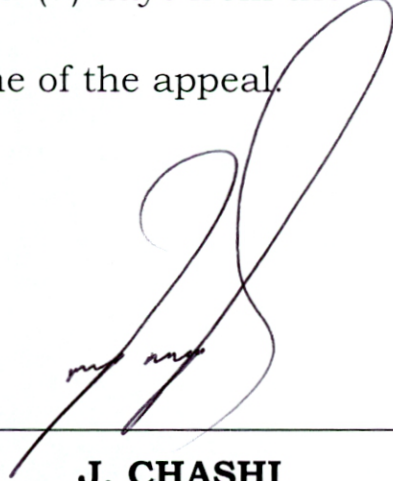
- (1) This means that in Zambia where the “Unless” Order has been made, and there has been a failure to comply with the Order within a specific period, that does not necessarily mean that the action is dead or defunct or that the Court is thereby deprived of the jurisdiction or power to extend time for doing a specific act within a specified time.*
- (2) The Court has power or jurisdiction to examine the reasons the applicant had not complied with the “Unless” Order and use its discretion to either grant leave or reject the application”.*

As regards the missing statement of accounts, that is conceded by the Appellant. We are however of the view that, it is a curable breach of the rules. This is not a breach in which we can exercise our discretion in favour of the Respondent and dismiss the appeal.

We say so, in view of the fact that the transgression by the Appellant has been rectified by the Respondents production of the missing statement of accounts in the affidavit in support of the notice to raise the preliminary issue.

In the view that we have taken, the preliminary issue is dismissed in line with the **Shoprite Checkers Limited**⁴case and we Order that the Respondent files a Supplementary record of appeal pursuant to Order 10/10 (1) **CAR** within seven (7) days from the date hereof.

Costs to abide the outcome of the appeal.



J. CHASHI
COURT OF APPEAL JUDGE



F. M. LENGALENGA
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE